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No. 85-12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

POTT INDUSTRIES INC.,
Petitioner,

vs.

INGRAM RIVER EQUIPMENT, INC.,
Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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On October 7, 1985, the Court granted the petition for a writ of certiorari (No. 84-1726) filed from the Third Circuit in *East River Steamship Corp. v. Delaval Turbine, Inc.*, 752 F.2d 903 (3d Cir. en banc 1985). No action was taken on the pending writ in this case. The principal substantive question raised in *East River* and in this writ is whether purely economic losses caused by a defective product can be recovered in a tort action under federal maritime law. We presume the Court decided to defer action on this writ on the premise that its opinion in *East River* would ultimately be dispositive of this case.

We are filing this supplemental brief to point out that *East River* may not necessarily be dispositive of the foregoing substantive question. To insure resolution of the issue, we suggest the Court reconsider and grant this writ and consolidate this case and *East River* for argument.

Unlike This Case, East River May Be Governed By Robins Dry Dock

In *East River* the plaintiffs are bare boat charterers of four supertankers who seek recovery in tort for economic losses caused by allegedly defective turbines designed and manufactured by the defendant. No direct contractual relationship between the charterers and the manufacturer is alleged and the charterers are seeking damages for "down time" and repair costs. 752 F.2d 903, 905.

For these reasons, even though not mentioned in either the opinion of the Third Circuit or the petition for a writ of certiorari, the facts presented by *East River* may be governed by this Court's decision in *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303 (1927).

In *Robins Dry Dock,* plaintiff was a charterer who sued a dry dock operator for down or lost time caused by the negligent repair of the chartered vessel. The Court unanimously held that a charterer had no remedy in either tort or contract because the dry dock operator was responsible to owner with whom it contracted, not the charterer. Mr. Justice Holmes wrote:

> ...no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. 275 U.S. 309.

If the Court concludes that *Robins* has continued vitality, then it could affirm or remand *East River* on the basis that plaintiff charterers have no contract or tort remedy against the manufacturer of a defective part sold to the owner of the vessel unless they can prove the manufacturer was, at least, aware of the charter. Such a decision would leave the substantive question of whether purely economic losses caused by a defective product can be recovered in a tort, as distinguished from contract, action in admiralty unresolved.

The instant case, on the other hand, presents a situation where the plaintiff and defendant had a direct contractual relationship pursuant to which the plaintiff has a recognized remedy for breach of warranty. In addition, the plaintiff was permitted by the court below to maintain a maritime tort action — negligence — to recover its economic losses — the cost of repairs. The other cases in the circuit courts which have dealt with this issue also involved a suit between the owner and the manufacturer of the defective product, where the plaintiff had recognized remedies for either breach of contract or breach of warranty. *See Miller Industries v. Caterpillar Tractor Co.*, 733 F.2d 813 (11th Cir. 1984); *Emerson G. M. Diesel v. Alaskan Enterprise*, 732 F.2d 1468 (9th Cir. 1984); *Jig The Third Corp. v. Puritan Marine Ins. Underwriters Corp.*, 519 F.2d 171 (5th Cir. 1976), *cert. denied*, 424 U.S. 954 (1976).

CONCLUSION

The most significant and recurring unanswered substantive question in this area is the availability of a tort remedy in admiralty for purely economic losses caused by a defective product. This question will not necessarily be resolved in *East River* because that case is arguably governed by the *Robins Dry Dock* decision. Accordingly, Petitioner Pott Industries Inc. respectfully suggests that a writ of certiorari issue to the United States Court of Appeals for the Eighth Circuit to insure resolution of all aspects of the economic loss doctrine in admiralty by this Court at this time.

Respectfully submitted,

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